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Supreme Court, U.S.
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No. 06-1304

IN THE

Supreme Court of the United States

ALPHA TELECOMMUNICATIONS, INC., PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Did petitioner waive a choice-of-law preemption claim when it failed to raise the issue below?

Petitioner identifies no split between the circuit courts on any issue of federal law. The lower courts did not address the issue of preemption because it was raised here for the first time. Should a writ of certiorari be granted to hear this fact-specific dispute?

The Sixth Circuit held that the parties' private contract terminated before the alleged breach. Petitioner does not challenge this holding under Ohio contract law. The Court does not apply preemption to private contracts. Moreover, the termination clause is not dependent on any federal action, and no federal action was directed to the contract. There is no conflict between state and federal law. Does petitioner have a viable preemption claim?

RULE 29.6

Pursuant to this Court's Rule 29.6, respondent states that International Business Machines Corporation has no parent corporation and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Petitioner miscasts this case as involving preemption. In truth, this is a straightforward case of contract construction to which Ohio rules of contract interpretation apply. This simple truth was evident to petitioner throughout this litigation. It brought this case in diversity jurisdiction and sought the application of Ohio law. But now, after losing before the district court and the Sixth Circuit, petitioner asks this Court to preempt the terms of the parties' contract with federal law.

This choice-of-law preemption claim is waived. And in any event, petitioner's claim of preemption is off the mark. The state law of contract interpretation allows consideration of any parol evidence, including evidence of a federal action, if a contract is ambiguous. The Sixth Circuit rejected petitioner's claim because of a failure of proof, not because state law failed to properly account for the FCC decision.

Ultimately, because petitioner failed to establish that the FCC's decision had any nexus to the termination date of the parties' contract – something petitioner concedes as a matter of state law – there is no conflict between federal and state law, and preemption does not apply. Moreover, this Court has not applied preemption to contracts between private parties that, as here, do not specifically impinge upon federal interests. Petitioner cannot identify any federal statute, regulation or common law that would justify disregarding the terms of the parties' contract.

STATEMENT OF THE FACTS

Petitioner Alpha Telecommunications and IBM entered into a contract, consisting of a Customer Solutions Agreement, dated May 25, 1999, and a

Statement of Work ("SOW"), dated January 2, 2002, whereby Alpha provided consulting services to IBM. Appendix to Petition For Writ of Certiorari, p. 5a. The Statement of Work stated that "Alpha Telecommunications, Inc. will perform services in this Statement of Work as required to meet customer requirements. For this Statement of Work, the Start Date will be December 1, 2001, and the Termination Date shall be December 1, 2003." *Id.* After December 1, 2003, IBM notified Alpha that it would not renew the contract. *Id.* at 7a.

Certain school district applications for E-Rate funds for the 2002 "project year" were denied. *Id.* On December 8, 2003, the FCC denied an appeal requesting that the FCC reverse the funding denials. *Id.* at 6a. The FCC decision allowed the districts to resubmit applications if they desired. *Id.* at 22a. The ruling did not mention, much less relate to, the parties' contract. *Id.* at 13a.

Alpha brought a breach of contract action against IBM in federal district court, claiming that the FCC's ruling extended the statement of work's termination date. *Id.* at 7a, 28a. Petitioner did not raise a claim of federal preemption. Rather, petitioner brought this claim pursuant to diversity jurisdiction, and sought the application of state law. IBM denied that it had terminated the parties' agreement, and denied any liability on Alpha's claims. *Id.* at 7a.

The district court granted summary judgment to IBM. *Id.* at 30a. It noted that the termination date in the contract was unambiguous, but ultimately granted summary judgment on other grounds. *Id.* at 31a.

The Sixth Circuit affirmed. *Id.* at 17a. It held that the December 1, 2003 termination date in the

statement of work was clear, and to the extent it was arguably ambiguous, Alpha presented no evidence that the date had changed as a result of the FCC's decision. *Id.* at 12a-14a. As the Sixth Circuit held, "the SOW does not state that its termination year is based on the FCC's project year, and Alpha fails to explain why the dates of the project year would have any bearing on the SOW's termination date." *Id.* at 13a. Since "Alpha offer[ed] no evidence that December 1, 2003 was not the termination date," the Sixth Circuit held that the contract expired on that date and Alpha was not entitled to damages for the alleged "termination" of an expired contract. *Id.* at 14a. Alpha did not raise the issue of federal preemption before the Sixth Circuit either.

Alpha requested a rehearing en banc, again failing to raise any issue of preemption. The Sixth Circuit refused to grant rehearing. *Id.* at 33a. This petition followed.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAIVED ANY CLAIM OF PREEMPTION.

Prior to its petition for a writ of certiorari, petitioner never contested the application of Ohio law to this case. Until this point, petitioner has never argued that any federal statute, regulation or common law preempted the application of Ohio law.

There is no dispute that federal jurisdiction over Alpha's claims exists; Alpha filed its complaint in federal court based upon diversity jurisdiction. Accordingly, the petition is based upon a claim of "choice-of-law" preemption, not "choice of jurisdiction" preemption. "Choice-of-law" preemption, if not asserted below, is waived. In *International*

Longshoremen's Association v. Davis, this Court held that preemption issues that dictate the choice of forum are jurisdictional and are non-waivable, but expressly did not extend that ruling to preemption issues affecting the parties' choice of law. *Davis*, 476 U.S. 380, 390-91 & n.9, 398-99 (1986); *see also Sweeney v. Westvaco Co.* 926 F.2d 29, 38 (1st Cir.) (Breyer, C.J.), *cert. denied*, 502 U.S. 899 (1991).

The circuit courts, seizing upon this distinction, have reiterated that where federal preemption affects only the choice of law, the defense is subject to waiver if not timely raised. *See, e.g., Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448-49 (1st Cir. 1995); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003); *Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc.*, 665 F.2d 466, 469-70 (3d Cir. 1981); *Dueringer v. General American Life Insurance Co.*, 842 F.2d 127, 130 (5th Cir. 1988); *Winstead v. Indiana Ins. Co.*, 855 F.2d 430, 435 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1489 (8th Cir.), *cert. denied*, 506 U.S. 872 (1992); *Gilchrist v. Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986); *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, 11 F.3d 1567, 1572 (10th Cir. 1993).

Because petitioner failed to assert preemption prior to its petition for a writ of certiorari, and as it does not justify its failure to raise this claim earlier, this Court should deem petitioner's preemption claim waived. Petitioner does not dispute the Sixth Circuit's ruling on any other ground. To the contrary, petitioner concedes that to the extent that Ohio principles of contract interpretation apply, the Sixth Circuit's decision was correct. Accordingly, petitioner has no proper basis for seeking review by this Court.

II. THIS IS A STRAIGHTFORWARD CONTRACT CASE THAT DOES NOT IMPLICATE PREEMPTION.

A. PETITIONER DOES NOT CONTEST THE SIXTH'S CIRCUIT'S DECISION UNDER OHIO LAW.

The contract between petitioner and IBM had a termination date of December 1, 2003. The Sixth Circuit, applying Ohio rules of contract interpretation, held that the contract provided that it terminated on December 1, 2003, and further held that petitioner offered no evidence that the parties changed that date. Accordingly, the Sixth Circuit rejected petitioner's claim that IBM breached the contract after December 1, 2003, and upheld the district court's grant of summary judgment.

Petitioner does not dispute that the Sixth Circuit's decision was correct under Ohio law.

B. FEDERAL PREEMPTION DOES NOT APPLY.

Federal preemption has no place in the interpretation of private contracts that do not touch upon the rights or duties of the United States. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995) (preemption does not apply to claim of breach of private contract, even in area regulated by Congress); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506-07 (1988) ("where 'litigation is purely between private parties and does not touch the rights and duties of the United States,' federal law does not govern") (quoting *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956)); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("Commercial agreements traditionally are the domain of state law."); *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977) (whether private

parties could sue as third-party beneficiaries to agreement between municipality and FAA was state law question because "the operations of the United States in connection with FAA grants such as these . . . would [not] be burdened" by allowing state law to apply and because "any federal interest in the outcome" was "far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern").

Such is the case here. Petitioner intimates that the statement of work was an FCC creation or that the FCC somehow referenced it. This is not the case. The statement of work was a private contract between IBM and Alpha. The FCC order on which petitioner relies neither addressed nor affected the parties' contract. Accordingly, this case does not involve federal preemption.

Petitioner alleges that it was "a violation of the Supremacy Clause for the court of appeals to override the FCC's power to affect the parties' agreement about when the SOW was going to end[.]" Petition for Writ of Certiorari, p. 16. But the Sixth Circuit did not "override the FCC's power" to do anything, and the holding was not predicated upon the rejection of any federal law or regulation. Rather, as the Sixth Circuit held, petitioner failed to produce evidence that the FCC's decision had any relationship to the parties' private contract, or bearing upon the termination date set forth in the contract. As the court held, "the SOW does not state that its termination year is based on the FCC's project year, and Alpha fails to explain why the dates of the project year would have any bearing on the SOW's termination date." Appendix to Petition for Writ of Certiorari, p. 13a.

Because petitioner failed to establish a link between the parties' private contract and the FCC's

decision, preemption is a red herring. Ohio rules of contract construction did not bar consideration of the FCC's extension of the funding window for the E-Rate program. To the contrary, the Sixth Circuit specifically considered Alpha's argument that the FCC's decision bore upon the parties' intent to extend the termination date. The Sixth Circuit's rejection of the claim because of petitioner's failure of proof does not mean that state law of contract, as applied by the lower courts, ignores or places insufficient weight upon federal statute or regulation.

Indeed, if petitioner had evidence that the FCC's decision bore upon the contract's termination date, nothing in state law would prohibit review of such evidence, and this evidence would be considered whether or not there was federal preemption. Without that proof, the FCC's decision had no relevance, with or without preemption.

Moreover, to the extent preemption were at play here, petitioner cannot articulate why the termination provision of this contract would be preempted. Preemption would ostensibly be governed by 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and 47 U.S.C. § 253(d), which provides for preemption when a state law or regulation conflicts with section 253(a) (or section 253(b), which is not at issue here).

Petitioner does not explain how the Sixth Circuit's application of Ohio contract law to the contract's termination date prohibited "any entity from providing interstate or intrastate telecommunications service." The Sixth Circuit's decision did not prohibit IBM from providing telecommunications service and

did not prohibit any school district for applying for E-Rate funds, to the extent section 253 applies to the E-Rate program. *See Nixon v. Missouri Municipal League*, 541 U.S. 125, 143 (2004) (restricting scope of preemption under § 253(a) given ambiguous nature of "any entity"). And there is nothing in the record indicating that the FCC's interests were affected by either the parties' contract or by the Sixth Circuit's interpretation of that agreement. Given the absence of any conflict between federal and state law, preemption is unwarranted.

Petitioner alternatively claims field preemption. Petition for Writ of Certiorari, pp. 19-20. But field preemption applies only when Congress makes that "atypical intention clear." *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S. Ct. 2121, 2135 (2006). Under 47 U.S.C. § 254(f), a state may adopt regulations not inconsistent with FCC's "rules to preserve and advance universal service." *See also Nixon*, 541 U.S. at 143 (rejecting a preemption claim in a section 253 case without alternatively considering field preemption). Moreover, were this Court to apply federal common law, as petitioner requests, this Court presumptively adopts the law of the forum state as federal common law. *See, e.g., Empire Healthchoice*, 126 S. Ct. at 2131-32 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979)). As such, even if federal common law applied, the result would be precisely the same.

At the end of the day, this is a simple case of contract interpretation based upon normal (and universal) principles of contract construction. The IBM-Alpha contract did not state that its termination would be affected by any decision of the FCC, the FCC order did not address or relate to the contract, and the parties did not agree to extend the termination date set

forth in their contract.[1] Petitioner concedes that this evidence, under Ohio law, warranted summary judgment in IBM's favor. Petitioner's last-ditch attempt to do an end run around this decision by claiming federal preemption is off the mark.

III. NONE OF THE TRADITIONAL INDICIA OF CERTWORTHINESS EXIST.

Petitioner fails to satisfy the criteria set forth in Supreme Court Rule 10. Petitioner identifies no split between the circuit courts on an issue of federal law. Indeed, the lower courts did not even rule on any issue of federal law, as petitioner did not raise the issue of preemption before now. Petitioner's request that this Court review this case, when the preemption issue was not presented below and where no circuit split exists, should be rejected.

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[1] Even had the termination date been extended, payment to petitioner under the contract was contingent upon the school districts receiving funding, which they never did.

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CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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